

**Confederated Tribes *of the*
Umatilla Indian Reservation**

Office of Legal Counsel



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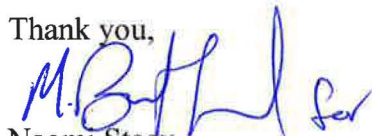
September 6, 2016

U.S. Environmental Protection Agency
ATTN: Harbor Comments
805 S.W. Broadway, Suite 500
Portland, OR 97205
EMAIL: harborcomments@epa.gov

Dear Sir to Madam,

Attached are the Confederated Tribes of the Umatilla Indian Reservation's comments to the U.S. Environmental Protection Agency regarding the Proposed Cleanup Plan for the Portland Harbor Superfund Site. If you have any follow-up questions please contact me using the contact information above.

Thank you,


Naomi Stacy
Lead Attorney

1. Introduction

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) as a Trustee on the Portland Harbor Natural Resource Trustee Council (Trustee Council) is submitting comments to the United States Environmental Protection Agency (EPA) to advocate for a more aggressive cleanup plan that better protects the CTUIR's treaty-reserved natural resource rights and encourage an alternative that is more protective of human health, the environment and fully complies with federal law, state law and the requirements of Superfund regulations and guidance.

Therefore, after participating in this Superfund process as a partner to EPA under a Memorandum of Understanding since the Portland Harbor Superfund Site was listed; review of both the Portland Harbor Remedial Investigation Report and the Portland Harbor Feasibility Study Report; participation and review of the National Remedy Review Board (NRRB) and Contaminated Sediments Advisory Group (CSTAG); two government-to-government consultations with EPA; review of the Proposed Plan; review of Industrial Economics, Incorporated's (IEC) technical comments on the Proposed Plan; the Confederated Tribes of the Umatilla Indian Reservation cannot support the EPA's preferred Alternative I because it is not protective enough of human health or the environment in either a reasonable timeframe or in perpetuity.

Under CERCLA § 121(b) and the requirements of Superfund regulations (40 CFR 300.430) and guidance (EPA 1988, 1990) only Alternative G meets all measurable interim targets for protection of human health and the environment. CERCLA 121(b) mandates that the alternative must meet the following requirements to be eligible for selection: (1) be protective of human health and the environment; and (2) comply with applicable or relevant and appropriate requirements in Federal, State and local environmental laws.

After review of the EPA's Proposed Plan and the EPA's nine alternatives, only Alternative G is sufficiently protective of human health and the environment in a reasonable time. The EPA's preferred Alternative I is not protective enough of human health or the environment and will not be as protective as Alternative G in a more reasonable time. Therefore, as described below, the Confederated Tribes of the Umatilla Indian Reservation support Alternative G, or in the alternative, some version of Alternative G that is sufficiently protective of the CTUIR's treaty-protected natural resource interests in the Willamette River and its people.

2. Importance of Site to the Confederated Tribes of the Umatilla Indian Reservation

The lower Willamette River is a resource of great importance to the CTUIR, as well as the general public. It is utilized for an array of activities including industrial and commercial enterprises, recreational uses, and tribal uses.

The Willamette River was a dynamic river system and provided pristine habitat for natural resources. Since the early part of the last century, the Willamette River has been

modified to control flooding, improve navigation, and develop industrial facilities through filling portion of the river and shoreline areas. The industrial facilities released and discharged hazardous substances to the Willamette River during their activities. Although many industrial facilities are no longer in operation, legacy contamination remains. These substances have degraded the available habitat and natural resource in the Willamette River, and earned Portland Harbor its place on the National Priorities list. For example, fish tissue contaminant concentrations are so high that it is not safe for vulnerable populations to consume any amount of key resident fishes, while consumption by the general public is only safe in very small quantities.

The main river channel also provides a critical migration corridor for anadromous fish species, habitat for juvenile fish to forage and avoid predators, and habitat for resident and benthic species. Among the anadromous species, Pacific salmon, Pacific lamprey, and white sturgeon are of particular cultural importance. For instance, Pacific lampreys migrate up the Willamette River to the Willamette Falls, which is home to the only major lamprey harvest opportunity for Native Americans in the area.

Native Americans have been using the Willamette Valley for thousands of years, from time immemorial, due to the abundance of salmon, game animals, seasonal migrating birds, and edible plant varieties. Subsequent to European contact and treaty agreements, many tribal bands became confederated and were moved to reservations. Despite these changes, Native American communities reserved hunting and fishing rights and certain gathering rights and maintain a connection with natural resources in the Willamette Valley that is unique and separate from the value that the general public holds for these resources. For example, the Pacific lamprey harvest is of great importance to many tribes, and tribal members have noted a decrease in abundance and quality of this resource due to the contamination in the Willamette River. The Tribes' hunting, fishing and gathering subsistence activities not only provide tangible benefits in terms of food for tribal families, but also provide a cultural heritage of knowledge and skills that is passed down to younger generations, as well as providing opportunities for tribal members to bond over a shared activity and to link generations. As such, remediation of the Portland Harbor Site and the attendant reduction in fish contamination is directly connected to the preservation of the cultural heritage of the CTUIR.

Possible Discussion of CTUIR Interests in:

- CTUIR Treaty Interests;
- CTUIR Treaty Interests in the Willamette River or historical/cultural duty to manage;
- CTUIR off-reservation fishing, hunting, gathering, subsistence rights
- Cultural or historical interests in managing off-reservation resources to protect treaty-reserved rights and resources?
- Comment 43 notes that the EPA's preferred alternative estimates that after construction, safe fish consumption will be limited to 160 fish meals per 10 years, which is significantly lower than the tribal consumption rate for resident fish used in the BHHRA (1,380 resident fish meals per 10 years) (IEc 5-Tribes Comments, Section 8.2, p. 16).

- Comment 47 urges EPA to thoroughly monitor contaminant concentrations in the tissue of migratory fish to determine whether FCAs for migratory fish are needed. Of specific concern to the Five Tribes, lamprey ammocoetes spend three to seven years burrowed in Site sediment and therefore are likely exposed to more Site contamination than other migratory fish like salmon (IEc 5-Tribes Comments, Section 8.2, p. 17).

3. Remedy Vision

The Site's myriad ecological functions and human uses – past, present, and expected future – underscore the tremendous importance of a remedy that achieves protection of human health and the environment within a reasonable timeframe. It is critical that the selection of the remedy be based, first and foremost, on best available science. Where scientific knowledge is uncertain, environmentally protective assumptions must be used.¹

To be truly protective of human health and the environment, the remedy must be protective in perpetuity. While we understand the difficulties inherent in planning for such a far-reaching time span, the health and well-being of our future generations depend on it.² We urge the EPA to adopt a remedy that will reduce risk to acceptable levels as quickly as possible. This includes substantially reducing fish tissue contaminant concentrations, with the goal of eliminating the need for fish consumption advisories (FCAs) in the future.

While it is not feasible for any remedy to achieve acceptable risk levels short of dredging the entire site, a remedy that is certain to achieve permanent protection must be largely based on the removal of contamination from the river.

4. Pathway for Achieving Vision

1) Achieving a protective remedy within a reasonable timeframe will require an aggressive, large-scale remedy. The remedy should predominantly entail removal of contaminated sediments, rather than leaving contamination in place, and include the use of best management practices (BMP) to minimize short-term impacts. Much uncertainty remains about the timeframe for natural recovery. Thus, the remedy should not be overly dependent on natural recovery.

2) A timeframe must be established by which to meet all remedial action objectives (RAOs) and associated acceptable risk levels. The selected remedy should have a very likelihood of achieving cleanup goals within 10 years following construction.

¹ Where scientific knowledge is uncertain, protective assumptions must be used and not natural recovery. See § 4: *"Much uncertainty remains about the timeframe for natural recover. Thus, the remedy should not be overly dependent on natural recovery ((1), p.4)." See also "The inability of EPA and LWG to develop a hydrodynamic and sediment transport model that accurately predicts deposition and erosion highlights this complexity [hydrodynamics of the Willamette River] (IEc 5 Tribes Comments, p. 4).*

² another good point for the CTUIR to hammer home

The uncertainty of natural recovery processes at the Site further underscores the importance of selecting a remedy that does not rely on a lengthy (i.e., more than 10-year) recovery period following construction.

Iec's recommended pathway to achieving a protective remedy.

4.1 Monitored Natural Recovery, Enhanced Natural Recovery, and Capping

3) For practical purposes this remedy will need to rely in part on monitored natural recovery (MNR), enhanced natural recovery (ENR), and sediment capping. However, these technologies should be used judiciously because the hydrodynamics of the Willamette River are so complex and even areas that are primarily depositional also erode. The inability of EPA and LWG to develop a hydrodynamic and sediment transport model that accurately predicts deposition and erosion highlights this complexity.

Because tools are not available to accurately predict deposition and erosion on a fine spatial scale, we cannot assert the degree to which natural recovery processes will occur. Thus, EPA must use the environmentally protective assumption that natural recovery will be limited.

Capping contaminated sediments in-place can be a practical solution in certain circumstances. The dynamic nature of the Willamette River that neither EPA nor LWG could accurately model presents challenges in designing and maintaining a permanent cap. Maintaining caps in perpetuity also prevent long term challenges from monitoring and maintenance and place restrictions on river use for capped sections of the Site. The CTUIR therefore urge EPA to adopt a removal-based remedy that limits the use of caps, ENR and MNR.

The CTUIR does not believe that NAPL or principle threat waste (PTW) that cannot be reliably contained should be left in the river, as these materials can migrate and continue to be a source of ongoing contamination. Nor does the CTUIR believe that capping should be done over NAPL or principle threat waste because these material may currently migrate horizontally or in the future when environmental conditions, such as hydrology, change. These materials should only be capped if they are under a structure that cannot be removed or if located too deep for the best available technology to reach.

4.3 Stringent Cleanup Goals

The CTUIR understands that EPA has the ability to change PRGs as they become final cleanup levels in the Record of Decision (ROD). The PRGs are generally based on sound science and applicable or relevant and appropriate requirements (ARARs³), and the CTUIR strongly urge EPA not to increase these values in the ROD.

³ ARARs: applicable requirements are those cleanup standards, standards of control, and other substantive requirement, criteria, or limitations promulgated under Federal environmental or State environmental or facility siting laws that specifically address a hazardous substance, pollutant, contaminant, remedial action, location or other circumstance found at a CERCLA site.

The CTUIR acknowledges that certain parties do not believe it is possible that certain cleanup goals based on background concentrations might not be met at the Site due to inputs from outside Site boundaries. However, the CTUIR does not support the issuance of an ARAR waiver (e.g., based on technical impracticability) as waving these requirements would diminish protection of treaty-reserved rights and resources.

5. Conclusion

In conclusion, the Confederated Tribes of the Umatilla Indian Reservation support Alternative G, or in the alternative, some version of Alternative G that is sufficiently protective of the CTUIR's treaty-protected natural resource interests, fully complies with federal law and the EPA's own guidance, and is remedy based on the best available science, and where this science is uncertain than environmentally protective assumptions are used to bolster uncertainty because an aggressive, science-based alternative will be the most protective remedy for human health, the environment and is achievable within a reasonable timeframe, especially in regards to the safe consumption of fish and lamprey.